

with its tentative conclusion to implement BPP, however, the reasonable investment-backed expectations of these owners would be seriously undermined, and even though the Commission indicates in the FNPRM that it will review its rules governing pay telephone compensation,^{48/} it is certain that the economic value of these investments would be significantly reduced, or perhaps, rendered worthless. In this regard, the courts have ruled that an unconstitutional "taking" has occurred in situations where government agencies interfere with investment-backed expectations.^{49/} As such, a decision by the Commission to implement BPP could be considered an unconstitutional "taking" of private property. For this reason, the Commission should rely on the access code dialing scheme to enable callers to reach their preferred OSPs rather than mandate implementation of BPP.

26. Moreover, when considering whether to implement BPP, the Commission should give serious consideration to the recent decision of the Court of Appeals for the District of Columbia concerning collocation of competitive access provider special access facilities in LEC central offices.^{50/} In that case, the court stated that the Commission's collocation requirements

^{48/} The Commission indicates that, if BPP is implemented, it will revise the "payphone compensation rules to increase the compensation of [competitive payphone providers]." FNPRM at ¶ 33.

^{49/} See Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164 (1982); see also, Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986).

^{50/} Bell Atlantic Tel. Companies v. Fed. Communications Comm'n, Case No. 92-1619 (decided June 10, 1994).

implicated the Fifth Amendment's Takings Clause because the agency had other means to achieve its objectives. In this regard, the court stated that "the Commission does not even contend that its authority to regulate telecommunications in the public interest would be seriously hampered, much less defeated, absent takings authority."^{51/} Also note that in order for a "taking" to occur which requires just compensation by the Government it is not necessary that the owner of the property be deprived of all economic value of the property. In its recent decision in Dolan v. City of Tigard, the Supreme Court recognized that after the "taking" the petitioner was still "able to derive some economic use from her property."^{52/} The Court nevertheless found an unconstitutional taking. The Court emphasized that: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."^{53/} Thus, because the Commission has other means to achieve its public interest objectives in this proceeding, and because the Commission already has achieved those objectives through its authority under TOCSIA, implementation of BPP also would raise serious questions concerning violation of the Takings Clause.

^{51/} Id. at 10.

^{52/} 62 U.S.L.W. 4576 at n. 6 (June 24, 1994).

^{53/} Id. at 4581.

27. Relatedly, as will be discussed in detail below, the costs of implementing BPP would be enormous and would dwarf the proffered benefits. For this reason, implementation of BPP would be "arbitrary and capricious" and in violation of Section 553 of the APA.^{54/}

28. Under relevant case law, administrative agencies are given wide latitude when promulgating rules and regulations, but must nonetheless examine the relevant data and articulate a "rational connection between the facts found and the choice made."^{55/} Given this standard of review, a decision by the Commission to implement BPP would clearly violate Section 553 of the APA. The costs of implementing BPP, according to the Commission's own estimates, would be staggering, and given the existing availability of other means to meet the Commission's goals in this proceeding, there are no rational reasons for mandating implementation of BPP. In other words, a decision to implement BPP would be "arbitrary and capricious" because it would "run counter to the evidence before the agency."^{56/}

^{54/} See Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co., 103 S.Ct. 2856 (1983); see also, Greater Boston Television v. Fed. Communications Comm'n, 444 F.2d 841 (D.C. Cir. 1971); David Ortiz Radio Corp. v. Fed. Communications Comm'n, 941 F.2d 1253 (D.C. Cir. 1991).

^{55/} Id. at 2866; see also, Burlington Truck Lines, Inc. v. United States, 83 S.Ct. 239, 245 and 246 (1962).

^{56/} Id. at 2867; see also, Securities and Exch. Comm'n v. Chenery Corp., 67 S.Ct. 1575, 1577 (1947).

**5. The Costs of Implementing Billed Party Preference
Would Be Enormous and Greatly Exceed All of the
Benefits Identified by the Commission**

29. If BPP is mandated by the Commission, LECs and OSPs will have to make enormous investments in order to comply with the mandate. Ultimately, consumers will be the ones who pay for these investments even though, based on the record developed in response to the NPRM, not a single consumer advocacy group favors implementation of BPP.

30. As described above, the Commission indicates in the FNPRM that the cost to LECs of implementing BPP would be approximately \$1.1 billion in nonrecurring charges and \$60 million in annual recurring expenses.^{57/} However, these figures, while enormous, do not tell the whole story because they do not include the overhead loading costs many LECs would incur.^{58/} In their comments on the NPRM, a number of entities indicated that the cost of implementing BPP would add between \$0.11 and \$0.16 to the cost of every "0+" call.^{59/} Likewise, as indicated above, the Commission also indicates that OSPs

^{57/} FNPRM at ¶ 27.

^{58/} According to the Commission, these annual overhead loading costs probably would be in the neighborhood of 25 percent. FNPRM at ¶ 27.

^{59/} Comments of Ameritech Corporation at 16 (dated July 7, 1992) (estimating a per-call cost increase of \$0.16); Comments of BellSouth Corporation at 12 (dated July 7, 1992) (estimating a per-call cost increase of \$0.11); and Comments of NYNEX Corporation at 17 (dated July 7, 1992) (estimating a per-call cost increase of \$0.14).

themselves would incur nonrecurring charges approximating \$120 million to implement BPP.^{60/}

31. While these cost estimates are staggering, it is important to note that, as the Commission points out in the FNPRM, the true costs of implementing BPP are difficult to gauge because, among other things, some of the software necessary to implement BPP has yet to be developed.^{61/} Accordingly, the actual cost of implementing BPP may be significantly higher than the Commission estimates. Indeed, the usual outcome in situations such as this is that cost estimates are usually lower than the final costs.

32. Regardless of the actual cost of implementing BPP, the Commission, if BPP is implemented, should require that the entities which use BPP, and only those entities, pay for BPP. As the Commission notes in the FNPRM, agency policy is to "attribute costs to cost causers."^{62/} It would be grossly unfair for the enormous costs of BPP to be borne in whole or in part by entities

^{60/} FNPRM at ¶ 28.

^{61/} FNPRM at ¶ 20.

^{62/} FNPRM at ¶ 58; see also, Expanded Interconnection with Local Telephone Company Facilities, FCC 94-118 at ¶ 46 (released May 27, 1994) (the requirement that tandem switching providers bear the costs of making signalling information available for their use was consistent with the Commission's long-held view that costs should be borne by cost causers); see also, Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 8 FCC Rcd 4478, 4483 (1993) (the Commission's "policy is that the costs of providing a service should be borne by the cost causers"); MTS and WATS Market Structure, 93 F.C.C.2d 241, 402 (1983) (costs should be "assigned to the cost causer in order for society to best utilize its resources").

that neither want or use BPP. If the Commission is correct in its tentative conclusion that the benefits of BPP outweigh the costs, then those who reap the benefits should be more than willing to pay for those benefits.

33. Given the enormous and ill-defined nature of the Commission's cost estimates and their consequent impact on the cost of operator services, the Commission's tentative conclusion to proceed with implementation of BPP is difficult to justify. This is especially true because, as discussed above, BPP is unnecessary, patently unlawful, likely to result in widespread confusion and frustration, and perhaps most important, would adversely impact the nation's economy, employment levels, and the long-term viability of the operator services market. Fortunately, it is not too late for the Commission to recognize the erroneous tentative conclusions reached in the FNPRM. CNS urges the Commission to do so and terminate this proceeding.

B. THE COMMISSION SHOULD TAKE THE ACTIONS REQUESTED BY CNS AND OTHERS TO LOWER THE COSTS OF OPERATOR SERVICE PROVIDERS SO THAT THEY CAN LOWER THEIR RATES

34. It is apparent from the FNPRM that one of the factors driving the instant proceeding is the Commission's perception that many OSPs are charging rates that are higher than the rates charged by AT&T. In this regard, the Commission notes in the FNPRM that third-tier OSPs, on average, charge \$0.19 more per minute than AT&T, and that BPP, by allowing callers to avoid having their calls routed to these OSPs, will pressure those OSPs

to lower their rates.^{63/} However, the Commission fails to consider that the rates of many OSPs are higher than those of AT&T because their costs are considerably higher in large part because of certain regulatory advantages possessed by dominant carriers as well as certain business practices utilized by those carriers. Some of these advantages and practices are relics of the monopoly system that existed before divestiture, and the Commission should eliminate them so that all OSPs can compete on a level playing field. Therefore, rather than implement BPP, which is anticompetitive and will create an oligopolistic OSP market, CNS urges the Commission to implement the procompetitive proposals outlined below which would reduce the costs of small/regional OSPs.

1. All Local Exchange Carriers Should Be Required to Provide Nondiscriminatory Billing and Collection Services to Operator Service Providers

35. One of the primary reasons that the prices of many of the small/regional OSPs are higher than those of AT&T and other large, nationwide OSPs is that LECs discriminate against small/regional OSPs in the provision of billing and collection services. By requiring LECs to provide all OSPs with billing and collection services on a nondiscriminatory basis, the Commission could significantly reduce their operating costs, and hence their rates, without incurring the enormous expense or engendering the

^{63/} FNPRM at ¶¶ 11 and 12.

controversy that will attend implementation of BPP. On the other hand, the Commission's proposal to implement BPP, even though the Commission claims in the FNPRM that it would ameliorate some of the billing and collection problems faced by small/regional OSPs,^{64/} would drive many of those OSPs out of business before they could experience any of the relief the Commission claims BPP would create. Needless to say, this is a classic case of throwing the baby out with the bath water.

36. Under the terms of their respective consent decrees, the BOCs and the GTE Telephone Operating Companies are required to provide billing and collection services to all IXC's if they provide those services to any IXC.^{65/} The independent LECs, however, are not subject to these decrees and, as a result, many do not offer billing and collection services to small/regional OSPs at any price. In fact, as many as 400 of the 1,200 LECs do not offer billing and collection services to small/regional OSPs at any price.^{66/} As a result, while the large, nationwide OSPs such as AT&T have billing and collection agreements with every LEC across the country, small/regional OSPs such as CNS

^{64/} The Commission indicates that BPP, if implemented, would likely reduce OSPs' costs of collections and uncollectables because after implementation OSPs would generally be billing only their presubscribed customers and not one-time callers. FNPRM at ¶ 17.

^{65/} United States v. W. Elec. Co., 552 F. Supp. 131 (D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); United States v. GTE Corp., 603 F. Supp. 730 (D.C. 1984).

^{66/} Fidelity Tel. Co. v. Southwestern Bell Tel. Co., Post-Hearing Brief of Defendant Southwestern Bell Telephone Company, File No. 92-4326-CV-W-8, at n. 26 (1992).

Examples include Sugarland Telephone Company and the Fort Bend Telephone Company which serve the suburbs of Houston.

frequently are unable to obtain these agreements. This puts them at a distinct competitive disadvantage vis-a-vis AT&T because they cannot complete many calls which reach their networks. In addition to losing the revenues from not completing the calls, they also must incur substantial costs transferring the nonbillable calls to other OSPs.

37. The inability to obtain billing and collection agreements with the independent LECs impacts small/regional OSPs such as CNS particularly hard. Many of CNS's customer locations are located in Texas. Independent LECs operate in substantial portions of Texas. Some of these independent LECs serve geographic areas that were once remote, lightly populated regions which have become populous, rapidly growing suburbs in recent years. CNS does not receive billing and collection services from these independent LECs and, therefore, is unable to carry calls that end users wish to charge to calling cards issued by them or calls which customers wish to have billed collect or to a third party by these carriers.

38. In light of the foregoing, CNS has been active in trying to reduce the operating costs of small/regional OSPs so as to improve their competitive position vis-a-vis large, nationwide OSPs. For example, in June of 1989, CNS and CompTel petitioned the Commission for nondiscriminatory access to the validation and billing and collection data of LECs.^{67/} Nonetheless, even

^{67/} Petition to Mandate Availability of Essential Billing and Collection Services and Access to Call Validation Data on a Just
(continued...)

though the Commission has granted parts of the CNS/CompTel Petition, the BOCs, in conjunction with Bell Communications Research, Inc. ("Bellcore"), still maintain a virtual monopoly over the billing and collection of LEC calling card calls, collect calls, and calls billed to third parties, and use this monopoly to discriminate against small/regional OSPs such as CNS.^{68/} Therefore, instead of implementing BPP, the Commission should require all LECs, including the independent LECs, to

^{67/} (...continued)

and Reasonable Basis or in the Alternative Petition for Rulemaking (filed June 1, 1989) ("CNS/CompTel Petition"). In May 1992, partly in response to the CNS/CompTel Petition, the Commission required the LECs to provide IXCs nondiscriminatory access to validation and screening data. Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 7 FCC Rcd 3528 (1992). In May 1993, the Commission required LECs to provide IXCs nondiscriminatory access to the billing name and address of their customers who use LEC calling cards or who authorize collect and third party calls. Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 8 FCC Rcd 4478 (1993) ("BNA Order"). However, requiring LECs to provide billing name and address information is an inadequate response to the discrimination faced by CNS and other small/regional OSPs because, unlike the situation faced by AT&T, these OSPs would need to directly bill their customers for LEC calling card, collect, and third party-billed calls. As a result, these OSPs, if they were to avail themselves of the billing name and address information made available to them under the BNA Order, would incur extremely high uncollectables. Moreover, even apart from the uncollectable problem, it is much more expensive per call record for OSPs to utilize billing name and address information in attempting to bill for themselves. Accordingly, CNS urges the Commission to revisit its decision not to grant all of the relief requested in the CNS/CompTel Petition. See Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 6 FCC Rcd 3506, 3509 (1991).

^{68/} See Fidelity Tel. Co. v. Southwestern Bell Tel. Co., Reply Brief of Fidelity Telephone Company in Opposition to Post-Hearing Brief of Southwestern Bell Telephone Company and Bell Communications Research, Inc., File No. 92-4326-CV-W-8 (W.D. Mo. 1992) ("Fidelity v. SWBT")

provide all OSPs with nondiscriminatory billing and collection services.

2. The Commission Should Require Local Exchange Carriers to Price Billing and Collection Services on a Nondiscriminatory Basis

39. Not only do small/regional OSPs face discrimination in the provision of billing and collection services, they also face discrimination in the pricing of those services by LECs that are willing or required to provide such services. Specifically, as will be discussed below, the method of billing and collection used by most LECs costs much less for each call billed and collected than it does for CNS to have calls billed and collected pursuant to individually negotiated billing and collection agreements.

40. Presently, the BOCs bill and collect approximately 90 percent of all "0+" calls in the United States, and 85 percent of those calls are settled through individual billing and collection agreements that the BOCs have with OSPs and call aggregators.^{69/} The remaining 15 percent are settled through two main frame data processing systems, the Central Message Data System I ("CMDS I") and the Bellcore Client Company Calling Card and Third Number Settlement System ("BCC CATS"), owned by Bellcore on behalf of the BOCs but operated by SWBT under contract.^{70/} The ability to use the CMDS I/BCC CATS system to bill and collect "0+" calls, as

^{69/} Id. at 49 and 50.

^{70/} Id.

opposed to having to negotiate individual billing and collection agreements with all 1,200 LECs across the nation, has many advantages. Unlike the hodge-podge of billing and collection agreements negotiated by most small/regional OSPs, billing and collection through the CMDS I/BCC CATS system provides nationwide coverage, and most importantly, cost significantly less. In this regard, Mr. Robert A. Rowland, President of CNS, testified during the Fidelity v. SWBT case that, if operator service calls are handled by CNS and billed through a billing and collection agreement with Southwestern Bell Telephone Company ("SWBT"), CNS must pay an average of \$.34 per call for SWBT to bill each call, collect the revenue, and remit the revenue to CNS.^{71/} However, if the CMDS I/BCC CATS system could be utilized, the same calls also would be billed by SWBT, revenue collected, and remitted to CNS for only \$.05 per call even though SWBT performs the exact same functions under both scenarios.^{72/} It is CNS's understanding that AT&T, as a vestige of its historical pre-divestiture relationship with LECs, is the only IXC able to utilize the CMDS I/BCC CATS system to process its call records at the rate of \$.05 per call.

^{71/} Id. For CNS to obtain billing and collection agreements from other LECs, it often must pay, on average, considerably more than \$.34 per call billed. It is unable to avail itself of purported volume discounts that, as a practical matter, are only available to AT&T because of its high volumes as a dominant carrier. CNS does not believe these volume pricing discounts are related to costs in this instance.

^{72/} Id.

41. It is also CNS's understanding that none of the uncollectable calls which are processed through the CMDS I/BCC CATS system are charged back specifically to the carriers that are allowed to participate in the system. In other words, it is CNS's understanding that all of the call records submitted by a BOC or AT&T at a rate of \$.05 per call record are "purchased" by the system participants through mutual honoring agreements without regard to whether the charges for the calls ultimately are collected. If this understanding is correct, then it means the general body of LEC ratepayers is paying for the uncollectable calls of AT&T, the only interexchange carrier which CNS understands is allowed to participate with the BOCs in the CMDS I/BCC CATS system.

42. Unfortunately, small/regional OSPs have been prevented from using the CMDS I/BCC CATS system by SWBT, as the BOCs' agent, and have therefore had to negotiate, if possible, individual billing and collection agreements with each of the 1,200 LECs. As discussed above, however, the independent LECs, due to the Commission's inaction, are not required to enter into billing and collection agreements with small/regional OSPs and as many as 400 have refused to enter into such agreements. Meanwhile, AT&T and the other large IXC already have long-standing billing and collection agreements with each of the LECs, and these agreements, even if made available at all to CNS and other small/regional OSPs, generally contain terms far more favorable than these OSPs could ever hope to achieve.

Essentially, these agreements contain steep price discounts when a certain high level of billing records are reached, typically call levels that can be reached only by AT&T. CNS does not believe this pricing structure used by LECs, although purportedly reflecting volume discounts, is really cost-based. In other words, the price differential for high volume vis-a-vis lesser call volumes generated by small regional carriers such as CNS is much greater than would be justified on a cost-basis.

Consequently, the disparate treatment accorded AT&T vis-a-vis the small/regional OSPs in the provision of billing and collection services significantly increases the operating costs of these small/regional OSPs and, generally speaking, is reflected in their price structure.

43. In light of the foregoing, CNS reiterates the request it made in the CNS/CompTel Petition - that the Commission require LECs to provide nondiscriminatory billing and collection services to all OSPs. The current billing and collection scheme allows LECs to discriminate against small/regional OSPs, and this increases the operating costs of these OSPs vis-a-vis those of AT&T. Requiring LECs to provide nondiscriminatory billing and collection services would do far more to lower the operating costs, and hence the rates, of small/regional OSPs than the extremely costly and anticompetitive proposals contained in the FNPRM.

3. The Commission Should Restrict Use of AT&T's Proprietary Calling Card to Access Code Calling, or Alternatively, Require AT&T to Provide Nondiscriminatory Validation of Its Proprietary Calling Cards

44. In the FNPRM, the Commission correctly indicates that AT&T has an advantage in competing for presubscription agreements with call aggregators because, through use of its CIID cards, it is the only OSP which can currently offer "0+" dialing.^{73/} However, this is not the only advantage AT&T gains from use of its CIID cards, and the Commission is mistaken to think that implementation of BPP would remedy the situation. The problems associated with use of CIID card result from AT&T's market position, and these problems can only be remedied by elimination of the practices that allow AT&T to abuse its market power. Implementation of BPP, which will force many of AT&T's existing competitors out business, would only make the situation worse.

45. As a provider of operator services, CNS receives thousands of telephone calls over its network every day from holders of AT&T CIID cards. Because AT&T will not provide CNS with the validation information it needs to complete these calls,

^{73/} FNPRM at ¶¶ 14 and 15. Relatedly, in the NPRM, the Commission sought comment on whether, pending implementation of BPP, it should require IXCs to share with other IXCs the billing and collection data for any calling cards usable with "0+" access. NPRM at ¶ 36. However, in a subsequent decision in this proceeding, the Commission concluded that the costs of the aforementioned proposal outweighed the benefits, but indicated that, if BPP is not implemented, it might reconsider whether further action might be needed to address this issue. Billed Party Preference for 0+ InterLATA Calls, 7 FCC Rcd 7714 (1992) ("Report and Order and Request for Supplemental Comment").

CNS must transfer these calls back to AT&T operators for completion at its own expense. Currently, it is costing CNS between \$100,000 and \$200,000 a month to transfer these calls back to AT&T.^{74/} In addition to the out-of-pocket expenses incurred by CNS and the revenues lost from uncompleted calls, callers that have been inconvenienced by CNS's inability to accept the CIID card incorrectly blame CNS for the problem when, in fact, the problem is caused by AT&T's choice to use "0+" access for its so-called "proprietary" calling cards. As such, AT&T leverages the discontent created by its refusal to share validation information into a means of obtaining presubscription agreements.

46. In light of the foregoing, CNS urges the Commission to restrict use of the CIID card to access code calling, or in the alternative, to require that AT&T provide CNS and other OSPs with nondiscriminatory access to the validation information necessary to complete calls made using its CIID cards. As indicated above, the Commission itself stated in the Report and Order and Request for Supplemental Comment that it might revisit these issues if, as CNS urges herein, it decides not to implement BPP.^{75/}

^{74/} In the Report and Order and Request for Supplemental Comment, the Commission cited these cost estimates without indicating it disagreed with the estimates. Report and Order and Request for Supplemental Comment at n. 54.

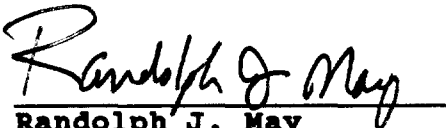
^{75/} Report and Order and Request for Supplemental Comment at 7726.

III. CONCLUSION

47. In light of the foregoing, Capital Network System, Inc. urges the Federal Communications Commission to take action in accordance with the views expressed herein.

Respectfully submitted,

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August 1, 1994

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CERTIFICATE OF SERVICE

I, Teresa A. Pumphrey, hereby certify that a copy of the foregoing Comments of Capital Network System, Inc. has been served by hand this 1st day of August 1994 on the following:

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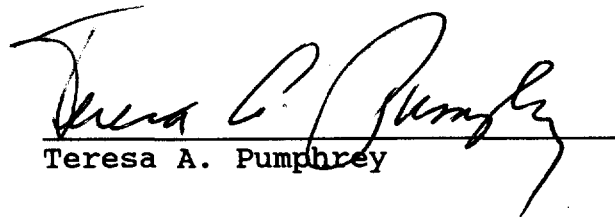
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